B. K. Restaurants Olean, Inc., d/b/a Burger King Restaurant and Tina M. Richards and Diana M. Bigelow. Cases 3-CA-9235 and 3-CA-9291

October 20, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND HUNTER

On September 29, 1980, the National Labor Relations Board issued a Decision and Order¹ in the above-entitled proceeding in which the Board, inter alia, ordered the Respondent to make whole certain employees for any loss of pay suffered by reason of the Respondent's discrimination against them. On June 2, 1981, the United States Court of Appeals for the Second Circuit entered its judgment enforcing the Board's Order, in relevant part. A controversy having arisen over the amount of backpay due under the Board's Order, as enforced by the court, the Regional Director for Region 3, on February 4, 1982, issued and duly served on the Respondent a backpay specification and notice of hearing, alleging the amounts of backpay due the discriminatees under the Board's Order and notifying the Respondent that it should file a timely answer complying with the Board's Rules and Regulations. Despite receiving two extensions of time which extended the due date for a timely answer to April 21, 1982, the Respondent failed to file an answer by that date.

Thereafter, on July 16, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 26, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motion should not be granted. On August 19, 1982, the Respondent filed an answer to the backpay specification, an affidavit in opposition to the Motion for Summary Judgment, and a request for rescheduling of the hearing, in which it denied the accuracy of the amount allowed in the specification for discriminatee Diana M. Bigelow. Thereafter, counsel for the General Counsel filed a motion to strike the Respondent's answer, its opposition, and its request. The Respondent filed an "Opposition to Motion to Strike and Requests for Subponae [sic] and for Freedom of Information Act Disclosures,"2

and the General Counsel filed a response to the Respondent's opposition to the motion to strike.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, provides in pertinent part, as follows:

(a) . . . The respondent shall, within 15 days from the service of the specification, if any, file an answer thereto

(c) . . . If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may,

port of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as

either with or without taking evidence in sup-

may be appropriate.

The backpay specification, issued and served on the Respondent on or about February 4, 1982, specifically states that the Respondent shall, within 15 days from the date of the specification, file with the Regional Director for Region 3 an answer to the specification and that, if the answer fails to deny the allegations of the specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them. According to the uncontroverted allegations of the Motion for Summary Judgment, on February 24, 1982, the Respondent requested a 30day extension of time within which to file its answer. The Regional Director issued an order on February 25, 1982, extending the Respondent's time to file an answer to March 29, 1982. The Respondent requested a second 30-day extension of time on March 31, 1982. On April 2, 1982, the Regional Director issued an order granting the Respondent a further extension of time to April 21, 1982, and noting that failure to file an answer by that date would result in the filing of a motion for summary judgment with the Board. On April 27, 1982, the Respondent notified the Regional Office that it was "withdrawing" its "appeal" with regard to Bigelow and would pay backpay to Bigelow and

² Sec. 102.117(c)(1) of the Board's Rules and Regulations, Series 8, as amended, requires that requests for documents held by a regional office be directed to that office. Since the documents requested by the Respondent apparently are held by Region 3, we have referred the Respondent's request to the Regional Director for Region 3, in accordance with the provisions of Sec. 102.117(c)(1).

the other discriminatee, Richards. It further proposed that it pay Bigelow at the rate of \$200 per week since, it asserted, it could not afford to make one lump-sum payment. On April 29, 1982, the Regional Office requested financial information to substantiate the Respondent's asserted inability to make a lump-sum payment to Bigelow. As of July 16, 1982, the date of the Motion for Summary Judgment, the Respondent had made no payments to Bigelow, had not responded to the Regional Office's request for financial information, had not filed an answer denying the specification with respect to Bigelow, and had not proffered an explanation for these failures.

As noted above, the Respondent filed an answer with the Board on August 19, 1982, nearly 4 months after the expiration of the last extension of time.⁴ The Respondent did not advance an explanation for its failure to file a timely answer.⁵

Therefore, in accordance with the rule set forth above, the allegations of the specification are deemed to be admitted as true and are so found by the Board without the taking of evidence in support of the said allegations.⁶

Accordingly, the Board concludes that the net backpay due discriminatee Diana M. Bigelow is as stated in the computations of the specification, and orders that payment thereof be made by the Respondent to her.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, B. K. Restaurants Olean, Inc., d/b/a Burger King Restaurant, Olean, New York, its officers, agents, successors, and assigns, shall make whole Diana M. Bigelow, by payment to her of \$9,737, plus interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), until payment of all backpay due is made, less tax withholdings required by Federal and state laws.

³ In the Motion for Summary Judgment, counsel for the General Counsel states that the other discriminatee, Tina M. Richards, has received the total amount of backpay due her.

⁴ The Respondent has submitted with its answer the affidavit of one of its officials which alleges that Bigelow was observed working at a restaurant during one quarter for which she has claimed no interim earnings. We note that the affidavit itself states that this information was known to the official in late 1979, more than 2 years prior to the issuance of the backpay specification. Thus, the matter raised in the answer is neither newly discovered nor previously unavailable evidence.

⁸ In its opposition to the General Counsel's motion to strike, the Respondent asserts, for the first time herein, that it failed to file a timely answer because it had notified the Regional Office informally that it disputed the specification as it related to Bigelow and that it was seeking legal counsel with experience before the Board. These assertions do not adequately explain or justify the Respondent's failure to file a timely answer. In addition, we note that, according to the uncontroverted alle-

gations of the Motion for Summary Judgment, the Respondent withdrew any dispute as to Bigelow's backpay by its letter of April 27, 1982, and that the Respondent was represented by counsel throughout the period during which a timely answer could have been filed.

⁶ In view of our decision herein, we find it unnecessary to pass upon the General Counsel's motion to strike.

⁷ See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).